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November 7, 2007

The Honorable Mary Pat Thyng  
 United States District Court for the District of Delaware  
 844 North King Street, Lock Box 8  
 Wilmington, DE 19801

RE: *Sepracor Inc. v. Dey, L.P. and Dey, Inc.*,  
C.A. Nos. 06-113-\*\*\* & 06-604-\*\*\* (Consolidated Cases)

Dear Magistrate Judge Thyng:

Plaintiff Sepracor Inc. ("Sepracor") files this letter in advance of the conference call scheduled for November 9, 2007. Sepracor has requested the conference call in order to seek relief from the Amended Stipulated Protective Order (D.I. 165) in this case (hereinafter, "Protective Order") so that Sepracor can comply with the directive of another federal judge.

In addition to being the plaintiff in this Hatch-Waxman action against Dey, L.P. and Dey, Inc. (collectively "Dey"), Sepracor is the plaintiff in a similar Hatch-Waxman action against Breath Limited ("Breath") that is pending in the U.S. District Court for the District of Massachusetts (No. 06-10043-DPW), assigned to The Honorable Douglas P. Woodlock (the "Breath case").

During a status conference on September 12, 2007 in the Breath case, Judge Woodlock directed Sepracor, at Breath's, request to produce expert reports exchanged in the Dey case. *See* Electronic Clerk's Notes of Status Conference of September 12, 2007 (attached to D.I. 216). When Sepracor's counsel advised Judge Woodlock that certain of the expert reports in the Dey case were or likely would be marked confidential under the protective order in this case, Judge Woodlock instructed Sepracor to "make a good faith effort to resolve third-party confidentiality issues." *See* Electronic Clerk's Notes of Status Conference of September 12, 2007 (attached to D.I. 216). Specifically, Judge Woodlock said:

. . . I am directing you to use your best efforts to obtain the information, including the Dey confidential information, in order to achieve that. And if it's necessary for another court to act on that, then I will look to you to get another court to act on it.

Transcript of September 12, 2007 at p. 26, lines 9-13 (attached to D.I. 216).

THE BAYARD FIRM

The Honorable Mary Pat Thyng  
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Dey marked all of its initial and rebuttal expert reports confidential under the Protective Order in this case.<sup>1</sup> On September 18, 2007, Dey advised Sepracor in writing that Sepracor cannot produce Dey's expert reports to Breath without violating the Protective Order in this case. *See Letter from E. Leff to Sepracor's counsel dated September 18, 2007 (Exhibit A).* Sepracor nonetheless has made multiple attempts to get Dey's cooperation with respect to Dey's initial expert reports. *See Letters from J. Wolfgang to E. Leff dated September 21, 2007 and October 3, 2007 (Exhibits B and C, respectively), and Letter from S. Dadio to E. Leff dated October 12, 2007 (Exhibit D).* To date, Dey has not responded to Sepracor's requests regarding Dey's expert reports.

Sepracor has produced to Breath its initial and rebuttal expert reports from this case that have not been designated as confidential. Further, after obtaining agreement from Dey, Sepracor has also produced a redacted version of the one initial expert report of Sepracor that was designated as confidential due to the inclusion of information designated by Dey as confidential under the Protective Order in this case.<sup>2</sup> Thus, in addition to Dey's initial and rebuttal expert reports, there remain two rebuttal expert reports of Sepracor that either include material designated by Dey as being confidential under the Protective Order in this case and/or rebut statements set forth in Dey's initial expert reports that were marked confidential by Dey.

Sepracor is unable to comply further with Judge Woodlock's instructions in the Breath case without assistance from this Court. Thus, Sepracor respectfully requests relief from the Protective Order in this case so that it may comply with Judge Woodlock's directive.

Respectfully submitted,

Richard D. Kirk (rk0922)

cc: Original to Court, by hand  
 All counsel of record as shown on attached service list  
 E. Anthony Figg (counsel for Breath Limited)

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<sup>1</sup> Supplemental expert reports have not yet been exchanged in this case.

<sup>2</sup> Breath is still seeking to obtain an un-redacted version of this initial expert report of Sepracor which includes Dey's confidential information.

## **EXHIBIT A**



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September 18, 2007

Elizabeth A. Leff  
[ELeff@flhlaw.com](mailto:ELeff@flhlaw.com)

**VIA E-MAIL**

William E. Davis  
Buchanan Ingersoll & Rooney PC  
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Susan Dadio, Esq.  
Barbara Webb Walker, Esq.  
Buchanan Ingersoll & Rooney PC  
1737 King Street, Suite 500  
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Jayson R. Wolfgang  
Buchanan Ingersoll & Rooney PC  
One South Market Square  
213 Market Street, 3<sup>rd</sup> Floor  
Harrisburg, PA 17101-2121

Re: Sepracor Inc. v. Dey, L.P. and Dey, Inc.  
Civil Action Nos. 06-113-\*\*\* & 06-604-\*\*\* (Consolidated Cases)

Counsel:

I understand from looking at the docket in *Sepracor v. Breath* Civil Docket No. 1:06-CV10043-DPW (D. Mass) that Judge Woodcock has ordered Sepracor to turn over Dey's expert reports to Breath. Dey had no notice of this hearing and thus, no opportunity to present its position before the Court.

As you are aware, Dey's expert reports were marked "CONFIDENTIAL UNDER THE PROTECTIVE ORDER". Pursuant to paragraph 19 of the Protective Order in these consolidated actions, documents designated as confidential must be treated as such until there is an agreement between the parties or the Delaware Court orders the designation be removed. Should Sepracor turn over the expert reports without following the procedures set out in the

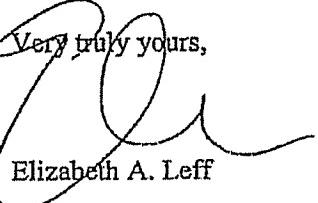
Buchanan Ingersoll & Rooney PC

September 18, 2007

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Protective Order, it will be in violation of the Protective Order and Dey will respond accordingly.

Very truly yours,

  
Elizabeth A. Leff

cc: Steve Balick, Esq.  
John G. Day, Esq.  
Richard D. Kirk, Esq.

## **EXHIBIT B**

**Buchanan Ingersoll & Rooney PC**  
Attorneys & Government Relations Professionals

Jayson R. Wolfgang  
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September 21, 2007

**VIA E-MAIL**

Elizabeth Leff, Esquire  
Frommer Lawrence & Haug LLP  
1667 K Street, NW, Suite 500  
Washington, DC 20006

**Re: *Sepracor Inc. v. Dey, L.P. and Dey, Inc.***

Dear Elizabeth:

We are in receipt of your letter of September 18, 2007 regarding the Order of Judge Woodlock in the *Sepracor v Breath* case dated September 12, 2007. That Order is available on PACER and requires Sepracor to produce to Breath "expert reports from [the] Dey litigation."

To put matters into perspective, we informed Judge Woodlock of the confidentiality obligations under the Stipulated Protective Order in the Dey case, and advised him that certain of the expert reports in the Dey case contain, relate to, or rely on Dey's confidential information. Judge Woodlock instructed Sepracor to use its "best efforts to obtain the information" for production in the Breath case and, if necessary, "to get another court to act on that." Thus, to the extent required by paragraph 30 of the Stipulated Protective Order in the Dey case, Sepracor hereby provides Dey with notice that Sepracor has received the above instructions from Judge Woodlock in the Breath case.

We do not believe that Dey should have any objection to Sepracor's production in the Breath case of any of Sepracor's expert reports that were not marked confidential. Please confirm.

As to any of Sepracor's expert reports that were marked confidential because they contain, relate to, or rely on Dey's confidential information, and as to Dey's expert reports, all of which were marked confidential, we understand Dey's position to be that Sepracor is not authorized to produce such reports in the Breath case. Please confirm. If our understanding on

September 21, 2007

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this point is correct, Sepracor is obligated in accordance with Judge Woodlock's instructions to seek Magistrate Judge Thynge's involvement.

Very truly yours,

s/ Jayson R. Wolfgang

JRW/cb

## **EXHIBIT C**

**Buchanan Ingersoll & Rooney PC**  
Attorneys & Government Relations Professionals

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October 3, 2007

*VIA E-MAIL.*

Elizabeth Leff, Esquire  
Frommer Lawrence & Haug LLP  
1667 K Street, NW, Suite 500  
Washington, DC 20006

Re: *Sepracor Inc. v. Dey, L.P. and Dey, Inc.*

Dear Elizabeth:

We have not heard from you in response to my letter of September 21, 2007 (copy attached). In that letter, Sepracor requested that Dey confirm its position on Sepracor's ability to produce confidential expert reports from the case against Dey to counsel for Breath in *Sepracor Inc. v. Breath Limited* as required by the order of Judge Woodlock in that case dated September 12, 2007.

Please confirm Dey's position on this subject by close of business on Friday, October 5, 2007. If we do not hear from you by then, we will seek Magistrate Judge Thyng's assistance in resolving this issue.

Very truly yours,

s/ Jayson R. Wolfgang

JRW/cb

## **EXHIBIT D**

**Buchanan Ingersoll & Rooney PC**  
Attorneys & Government Relations Professionals

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October 12, 2007

Elizabeth A. Leff, Esq.  
Frommer Lawrence & Haug, LLP  
1667 K Street, N.W.  
Suite 500  
Washington, D.C. 20006

VIA ELECTRONIC MAIL

Re: *Sepracor Inc v. Dey, L P and Dey, Inc.*  
Civil Action Nos. 06-113-\*\*\* & 06-604-\*\*\* (Consolidated Cases)

Dear Elizabeth:

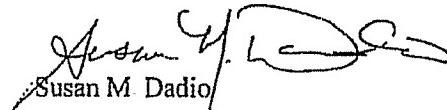
We have not received a response to the letters sent to you by Jayson Wolfgang on September 21, 2007 and October 3, 2007, in connection with our ability to produce confidential expert reports from the case against Dey to counsel for Breath in *Sepracor Inc v. Breath Ltd.*, Civil Action No. 06-10043-DPW.

With regard to Sepracor's expert report by Dr. Clive Page, attached hereto is a copy of Dr. Page's expert report (along with Appendix A - Materials Considered) which has been marked-up to show those portions of Dr. Page's expert report that we believe contain Dey's Confidential Information. The Dey Confidential Information has been marked by being placed within the handwritten boxes. Please confirm whether you agree that there is no Dey Confidential Information included in the portions of Dr. Page's expert report that has not been marked. If you agree, we will redacted the marked information and produce this redacted version of Dr. Page's expert report to counsel for Breath in accordance with the Stipulated Protective Order in the *Breath* case.

Please provide us with your response regarding the redacted version of Dr. Page's expert report no later than Friday, October 19, 2007. We also await receipt of your response regarding production of Dey's expert reports to Breath.

Sincerely,

BUCHANAN INGERSOLL & ROONEY PC

  
Susan M. Dadio

SMD/lp  
Enclosure

**CERTIFICATE OF SERVICE**

The undersigned counsel certifies that, on November 7, 2007, he electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send automatic notification of the filing to the following:

Steven J. Balick, Esquire  
John G. Day, Esquire  
Tiffany Geyer Lydon, Esquire  
Ashby & Geddes  
500 Delaware Avenue, 8<sup>th</sup> Floor  
PO Box 1150  
Wilmington, Delaware 19899

The undersigned counsel further certifies that, on November 7, 2007, copies of the foregoing document were sent by email and hand to the above local counsel and by email and federal express to the following non-registered participant:

Edgar H. Haug, Esquire  
Kimberly J. McGraw, Esquire  
Frommer, Lawrence & Haug L.L.P.  
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Elizabeth A. Leff, Esquire  
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/s/ Richard D. Kirk (rk0922)  
Richard D. Kirk